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in the

Supreme Court

of the

United States

October Term, 1984

PATRICK C. WALDROP,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

SUPPLEMENTAL BRIEF ON CERTIORARI

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The petitioner, PATRICK C. WALDROP, respectfully submits this supplemental brief in support

of his previously filed petition for a writ of certiorari, pursuant to Rule 22.6, Rules of the Supreme Court of the United States, calling this Court's attention to a new case not available at the time of the filing of said petition.

The petitioner, PATRICK C. WALDROP, has contended throughout the history of this litigation that he has been improperly convicted of violations of the RICO statute because the government has failed to prove, beyond a reasonable doubt, the commission of the two statutorily required predicate acts, establishing the pattern of racketeering activity charged and described in the indictment. Whereas the evidence introduced at the trial supports the contentions of the government that certain violations of law occurred, it is Mr. Waldrop's continuing contention that the self-same evidence established *two* separate enterprises, and only *one* pattern of racketeering activity. Viewing the evidence in the light most favorable to the government, the jury heard proof of only one predicate act committed pursuant to, and in furtherance of, the illegal enterprise charged in the indictment. The remaining two acts, which the indictment charged as predicate acts for the enterprise, were in furtherance of one different from that described in the indictment and, insofar as the state of this record is concerned, proved at the trial below.

Since the filing of Petitioner's brief in the Court of Appeals for the Eleventh Circuit and a petition for a writ of certiorari in this Court, the Eleventh Circuit, in *United States vs. Ruggiero*, 754 F.2d 927 (11th Cir. 1985), addressed the issue of how to determine or to differentiate between enterprises continuing at or about the same time in which related criminal activity may

be occurring. As that court said, the appeal in *Ruggiero* presented "an issue of first impression in this circuit: how to define the scope of a RICO violation for double jeopardy purposes." *United States vs. Ruggiero*, 754 F.2d at 929.

There are two necessary components that must be demonstrated, beyond a reasonable doubt, in order to establish a RICO violation. The first is the enterprise, which may be similar to in structure, and as inchoate as, the agreement in a conspiracy. The second is more precise and objective—that is, the pattern of racketeering activity. A pattern of racketeering activity unrelated to the charged enterprise will not support a conviction. When the pattern of racketeering activity (two predicate acts related to a specific enterprise) charged against Mr. Waldrop is analyzed pursuant to the five part test enunciated in *Ruggiero*, the enterprise supported and furthered by that activity is other than the one described in this indictment. *See United States vs. Ruggiero*, 754 F.2d at 931:

> The 'pattern of racketeering activity' is a separate element of the RICO offense, distinct from both the existence of the enterprise and the participation of the individual in the enterprise. *See United States vs. Phillips*, 664 F.2d 971, 1011 (5th Cir. Unit B 1981), *cert. denied*, 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982). (Footnote omitted.)

We demonstrate:

The enterprise described in the indictment and proved at trial consisted of a group of individuals

specifically named, augmented by others joining it as time went on, to import large quantities of marijuana into this country. In the government's view, and as stated in its Brief for the United States in Opposition at p. 3:

> The evidence showed that in late 1977 Villaneuva and co-defendants Jose Acosta and Antonio Bascaro were operating a large marijuana importation organization in southern Florida (38 R. 148-150). In the latter part of that year, Clyde ('Bill') Cobb became a member of the organization, assuming responsibility for storing the marijuana after importation and distributing the marijuana to wholesalers (38 R. 150). (Footnote omitted.)

While engaged in *that* enterprise, Clyde ("Bill") Cobb "decided to engage in a *new venture*." (Emphasis added.) (Brief for the United States in Opposition, p. 7.)

This new venture, formulated and participated in by Cobb, involved two attempted importations of marijuana by airplane. The first was in mid-January, 1979, which was unsuccessful as the DC3 and its cargo were seized by federal officials at Fort Lauderdale Airport, Florida; and there was no evidence, nor claim, of any participation by Mr. Waldrop. By the beginning of February, 1979, however, a second attempt was made to bring marijuana into this country by means of a Lockheed Constellation. Mr. Waldrop, according to the evidence at the trial, participated by negotiating for receipt of a substantial part of that marijuana and, also, by paying in advance a considerable sum of money. This attempted importation also met with a marked

lack of success as the plane was seized on its landing in Panama City, Florida.

This attempted Constellation importation gave rise to two of the three predicate acts which the government attempted to prove as the pattern of racketeering activity in support of the charged enterprise.

If the activities represented by the three predicate acts are one pattern of racketeering activity, then that prerequisite has been established by the proof in this case. If on the other hand, there are two different patterns of racketeering activity, then Mr. Waldrop has been convicted improperly. As the court stated in *Ruggiero*, 754 F.2d at 932:

> The crucial inquiry in this case, therefore, is whether the activities set out in the [two] indictments constitute one 'pattern of racketeering activity' or two different 'pattern[s].'

To determine whether there were two different patterns, the following five-part test is to be used:

> (1) whether the activities that allegedly constituted two different RICO 'pattern[s]' occurred during the same time periods;
>
> (2) whether the activities occurred in the same places;
>
> (3) whether the activities involved the same persons;
>
> (4) whether the two indictments alleged violations of the same criminal statutes; and

(5) whether the overall nature and scope of the activities set out in the two indictments were the same.

United States v. Ruggiero, 754 F.2d at 932.

Applying this measurement to the record in this case, the following are the logical and factual responses. (1) The activities that allegedly constitute the two different RICO patterns did occur during the same time period. (2) The activities did occur in generally the same places. For the purposes of this prosecution, it would appear that the State of Florida, if not the States of Florida and Georgia, would furnish identity in place. (3) The activities involved *some* of the same persons. Cobb is a main actor in both enterprises. The record here shows that Mr. Waldrop was engaged in both enterprises. The same can be said for one or two others. (4) The two enterprises involved violations of the same criminal statutes. (5) The overall nature of the scope of the activities involved in the two enterprises, the "most important factor," were *not* the same. *United States v. Ruggiero*, 754 F.2d at 934. The enterprise that was charged in the indictment was one organized and directed by Messrs. Villanueva, Acosta, and Bascaro.[1] The enterprise, which brought about the attempted importation by a DC3 and by a Constellation in January and February of 1979, was one created solely by Cobb

[1]The indictment defined the charged enterprise as one established by three named individuals, Manuel Eric Villanueva, Jose Luis Acosta and Antonio E. Bascaro, for the purpose of importing, possessing, with the intent to distribute and distributing "multi-ton quantities of marihuana on a continuing basis." (Count One, § 5.)

and in competition with the charged enterprise. The evidence is clear and unequivocal to that effect. The characterizations of two separate groups, showing a different nature and scope of activities, is best demonstrated by the testimony of two of the principal accomplice witnesses themselves. Both Thomas Alexander and Cobb testified that these importations were not involved with "Acosta and his group."[2] (Tr. Vol. VIII, pp. 117-18.) One need not go beyond the government's concession in its brief that the importation by air was a "new venture," when such statement concedes the distinctive nature of the two separate enterprises and their patterns of racketeering activity. (Brief for the United States in Opposition, p. 7.)

Mr. Waldrop has urged that the instructions utilized by the trial court could well have led to a finding that any criminal activity, involving violations of the narcotics laws committed by Mr. Waldrop, would be included within the pattern of racketeering activity the jury had to find to convict. The error is more obvious when

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[2]Alexander testified that in early 1979, Cobb,

> . . . got involved with a second group of people. The first group, Mr. Cobb, Mr. Acosta, those people used nothing but shrimp boats and they brought [marijuana] by water. We got—we made connections with a man by the name of Mr. Simeone who did smuggling by air.

(Tr. Vol. V, p. 164.)

Cobb testified in a similar fashion:

> Q. No Cubans were involved in that situation were there?
> A. No. * * *
> Q. Okay, but since it was not involved with Acosta and his group, you wouldn't have been getting money from any of those people for that deal, would you?
> A. If you're talking about the Constellation, no.

(Tr. Vol. VIII, pp. 117-18.)

a hypothesis is employed. If Mr. Waldrop had been convicted of the RICO violations charged in the indictment by the use of predicate acts other than the Constellation, and then be indicted for a separate RICO violation based upon the importations by air, demonstrated by the two abortive attempts in January and February of 1979, a double jeopardy argument raised by Mr. Waldrop would fail. The tests mandated by *Ruggiero* would compel a finding, particularly under the fifth standard, that the enterprises were different, separate, and each supportive of its own prosecution. Thus, it is the submission of Mr. Waldrop that predicate acts which establish a pattern of racketeering activity that would not support a double jeopardy claim cannot logically or consistently be employed to support a pattern of racketeering activity identical in terms and effect for two separate enterprises.

Conclusion

For these reasons, petitioner respectfully prays that this Court grant his petition for certiorari and set the case for briefing and argument.

Respectfully submitted,

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